No. 88-1031

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

CITIBANK, N.A.,
Petitioner,

—v.—

NGOC QUANG TRINH,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE PETITION AND BRIEF OF *AMICI CURIAE*

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MOTION OF THE NEW YORK CLEARING HOUSE ASSOCIATION AND THE INSTITUTE OF INTERNATIONAL BANKERS FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

The New York Clearing House Association (the "Clearing House") and the Institute of International Bankers (the "Institute") move pursuant to Rules 36.1 and 42 of the Rules of this Court for leave to file the brief annexed hereto as *amici curiae* in support of the petition for a writ of certiorari. Petitioner has consented to the filing of such brief, but respondent has refused to do so.

The Clearing House is an association of twelve leading commercial banks in the City of New York.[1] It clears com-

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[1] The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Manufacturers Hanover Trust Company, Irving Trust Company, Bankers Trust Company, Marine Midland Bank, N.A., United States Trust Company of New York, National Westminster Bank USA, and European American Bank.

mercial drafts and items in the New York City area, operates two electronic payment systems, including the Clearing House Interbank Payment System ("CHIPS") and files *amicus curiae* briefs before courts of appellate jurisdiction in cases which raise significant questions of law relating to banking.

The Institute of International Bankers is a non-profit corporation organized under the laws of New York, and is the only nationwide association of foreign banks with United States banking operations. A principal purpose of the Institute is the presentation of the views of foreign banks operating in the United States on issues of federal and state laws and policies affecting those operations. In that connection, the Institute has participated, through the filing of briefs *amicus curiae*, in cases that raise significant legal issues affecting foreign banking organizations maintaining United States operations.

The Clearing House's and the Institute's member banks are major participants in international banking. As of year-end 1987, for example, of the total of 902 branches operated in foreign countries by all United States banks which are members of the Federal Reserve System, 400 were operated by Clearing House banks, and the total deposit liabilities of the Clearing House member banks' foreign branches exceeded $170 billion. The Institute's membership includes more than 230 foreign banks, from over 50 countries, which maintain subsidiary banks, branches, agencies, or representative offices in the United States.

The Clearing House and Institute banks thus have a substantial interest in the application of fair, rational, and certain rules of law to international banking, as well as in the maintenance of a statutory and regulatory structure which enables those banks to compete effectively. The decision below threatens the stability and equity of that legal

regime by exposing United States banks, and by a parity of reasoning foreign banks doing business here, to novel and potentially vast liabilities on account of political upheavals in other countries.

For the reasons stated herein, the Clearing House and the Institute respectfully pray that the Court grant this motion for leave to file their brief.

Respectfully submitted,

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BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION AND THE INSTITUTE OF INTERNATIONAL BANKERS AS *AMICI CURIAE*

The New York Clearing House Association and the Institute of International Bankers submit this brief as *amici curiae* in support of the petition and on an issue of vital importance to the United States banking system: Whether the home office of a United States bank may be held liable for deposits placed in a foreign branch when the foreign government prevents repayment of those deposits by the branch.[1]

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[1] These *amici* plan also to submit a brief as *amici curiae* in support of the petition for certiorari shortly to be filed by Citibank, N.A. in *Wells Fargo Asia Ltd.* v. *Citibank, N.A.*, 852 F.2d 657 (2d Cir. 1988), another case presenting the same issue but in a different factual context, and respectfully suggest that the Court consider the two petitions together.

Statement

The decision below imposed liability on petitioner Citibank for a deposit made at its former Saigon branch on the ground that the closing of the branch shortly before the fall of Saigon to communist forces caused the deposit liability to "spring back" to Citibank's home office in New York (9a-10a, 16a & n.5).[2] Because of this alleged change in the situs of the deposit obligation, and for other reasons, the court of appeals rejected Citibank's contractual and statutory defenses of *force majeure* under Vietnamese law (7a-13a) and Citibank's contention that both the South Vietnamese central bank and the revolutionary regime had successively assumed by operation of law all deposit liabilities of the former branch (13a-17a).

In the end, the court of appeals appears to have applied what it deemed to be general common-law principles without a firm basis in any source of law, but purporting to be drawn from a variety of sources. The court nowhere addressed the compelling analysis of the requirements of United States law and policy with respect to the decision in this case emphasized by both Citibank and the United States in their respective briefs below.

Summary of Argument

The court of appeals articulated and enforced a rule of decision fixing vast liabilities on the United States banking system by misconstruction of general principles of law and without the slightest advertence to the strong considerations of United States public law and policy dictating a contrary conclusion.

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[2] Citations in the form "—a" are to the appendices to the petition. The joint appendix in the court of appeals is cited "JA".

A proper judicial analysis both of generally accepted legal principles and of the practical consequences of possible rules for the United States and its banking system requires that this Court exercise its plenary jurisdiction to prescribe a federal rule of decision precluding the imposition of liability on United States banks for foreign branch deposits when the branch's host government has prevented repayment by the branch.

Argument

The framework of federal law, regulation and policy and the considerations of national interest which require a federal rule of decision precluding liability in this and similar cases are fully discussed in the petition and need not be recanvassed here. We wish to emphasize only the following points.

A. The potential exposure to the United States banking system created by this and similar decisions of the lower courts runs to tens, if not hundreds, of billions of dollars; the Clearing House member banks alone have 400 foreign branches with deposits of over $170 billion. These decisions cannot be traced to basic and accepted legal principles; instead they ignore both such principles and clear and consistent articulations of federal law and policy regarding international banking, as shown in the petition. The creation of such massive risks cannot but have a substantial adverse effect on the maintenance and growth of the foreign branch operations of American banks, which have been fostered for decades because of their facilitation of the country's foreign commerce and of the Government's military, diplomatic, foreign aid and other activities abroad. The importance of these services to the Nation's economic

well-being and to the Government's conduct of foreign affairs is immeasurable.

B. The general need for legal certainty in the conduct of commerce is especially strong in international banking. The whole foundation of banking is the continual creation on a vast scale of executory contracts in the forms of deposits and loans; for this business to be conducted on an international scale, governing legal principles must be clearly articulated and understood. The branch situs rule for deposit obligations, paid lip service by the court of appeals (9a), had been thought to be such a principle and underlies both the framework of federal banking regulation and the daily conduct of business by international banks. Under that principle, historically recognized by courts in all world financial centers but disregarded below, a bank stands behind the commercial soundness of its foreign branches, but has no responsibility for legal regulation or political acts of the host state, which are understood to control the branch operations as a part of that state's own banking system.

C. It is undisputed that the original situs of the deposit here in question was Saigon. Indeed, it could have been nowhere else, for Vietnamese law precluded the transmission of the deposited funds outside the country for any purpose, including the establishment of a bank account in New York (JA 65, 126-27; see 20a). The result reached below thus necessarily depends on the conclusion that the evacuation of Citibank's employees shortly before Saigon fell and the consequent suspension of the Saigon branch's operations caused the situs of the deposit to "spring" to New York, a conclusion which is wrong as a matter of United States law:

1. The court of appeals' rejection of Citibank's contractual and statutory *force majeure* defenses under Viet-

namese law, while itself in error, cannot be decisive. The suspension of branch operations was a result of Citibank's compliance with the evacuation program of the United States authorities in Saigon. Aside from the fact that no law enjoins upon banks or other firms callous indifference to the safety and lives of their employees, any American organization in a foreign combat zone is duty bound to heed such instructions from the President's diplomatic and military representatives on the spot, rather than leaving hostages in the hands of an enemy regime. As a necessary corollary to the President's powers as Commander-in-Chief and in the conduct of foreign affairs, the juridical effect of compliance with his delegates' instructions, when placed in issue in our courts, must be determined as a matter of United States federal law. That effect surely cannot be the creation of new and additional obligations "springing" out of a foreign country into our own.

2. Nor can our national law admit of the peculiar notion espoused by the court of appeals to the effect that unfriendly foreign regimes may confiscate the assets of branches of United States banks within their countries without assuming their corresponding liabilities, but "instead" leaving those liabilities to be satisfied by the banks at their home offices (15a). Such a notion is novel, to say the least, and provides a blueprint for the waging of economic warfare against the United States by enabling hostile regimes to confiscate branch assets and send the depositors, including their own nationals, to collect a second time from the domestic assets of our banks. Indeed, the acceptance of such a notion by our courts would threaten not only our own banking system but those of other countries whose banks are subject to *in personam* jurisdiction in our courts. Not only is such a notion *a priori* absurd, but it makes a mockery of long standing regulatory practices whereby

safety and soundness regulation of branches is committed to the host country.[3]

D. Nor is there any domestic source of law from which a rule can be derived in support of the decision below. Indeed, the complete lack of legal basis for the decision below and the corresponding need for this Court to articulate a rule binding on all United States courts is evidenced by the analytical deficiencies of the decision below, which are unfortunately not atypical of such cases. Thus while the court of appeals' general principles were drawn in part from the Second Circuit's decision in *Vishipco*,[4] which in turn purported to apply New York law, New York statutory and decisional law unequivocally repudiates the result reached: *Vishipco*, the Heininger article [5] and the decision below all ultimately purport to construct the "springing" situs concept from the *Sokoloff* case.[6] *Sokoloff*, however, sets forth no such concept, and the New York Court of Appeals has held that *Sokoloff* involved "a deposit made in the National City Bank in the city of New York, governed solely by New York law," and has expressly limited it to those facts. *Dougherty* v. *Equitable Life Assurance Soc'y*, 266 N.Y. 71, 88, 193 N.E. 897, 903 (1934); *see also Tillman* v. *National City Bank*, 118 F.2d 631 (2d Cir. 1941), *cert. denied*, 314 U.S. 650 (1941). And the New York Legislature has mandated in Section 138 of the New

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[3] If the law of Vietnam in fact had purported to have such effect, which it did not, it would not have been given effect here as a matter of comity for it would have been repugnant to our own policies and in derogation of the rights of own our citizens. *Hilton* v. *Guyot*, 159 U.S. 113, 164 (1895).

[4] *Vishipco Line* v. *Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982) (Justices White and Powell dissenting).

[5] Heininger, *Liability of U.S. Banks for Deposits Placed in Their Foreign Branches*, 11 LAW & POL. INT'L BUS. 903 (1979).

[6] *Sokoloff* v. *National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924).

York Banking Law (McKinney 1971 & Supp. 1989) that the liability of any bank on account of foreign branch deposits be reduced *pro tanto* by the value of confiscated branch assets in circumstances such as are present here.

Thus, the general principles regarding home office liability for foreign branch deposits on which the court of appeals purported to rest its decision simply do not lead down the path it followed.

Conclusion

For the reasons stated in the petition and herein, *certiorari* should be granted to review the judgment of the United States Court of Appeals for the Sixth Circuit.

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